A COMPARISON OF SOME OF THE PRINCIPLES AND RULES OF PRACTICE OF THE AMERICAN AND THE CANADIAN COURTS

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The most notable contrast between American and Canadian procedure lies in the flexibility of the latter, due to the fact that it is created by rules of court and not by acts of legislature. In most of the United States legal procedure is of mixed origin. It is based partly on ancient common law practice, partly on rules of court, and partly on acts of legislature. It is the latter element which disturbs the symmetry of the system, and retards its natural evolution and efficiency.

In speaking of Canadian procedure I wish to be understood to be limiting myself to the consideration of the procedure in the province of Ontario. Quebec is the only one of the provinces of the Dominion which is still subject to French law, but, in its code of civil procedure the influence of the English system is apparent, for example, in the adoption of such writs as mandamus, injunction and prohibition. All of the other provinces are subject to a system of law and procedure which as to part of them (New Brunswick, Nova Scotia and Prince Edward Island) was brought in by the first colonists and as to one of them (Ontario) was adopted by legislative enactment in 1792. The other provinces (British Columbia, Manitoba, Alberta, Saskatchewan and the Yukon territory) are of later creation and subject to the rules of English law and procedure as modified by Canadian legislation and practice. Ontario has been the most progressive of the provinces and Ontario lawyers consider their system of procedure an improvement upon the parent system established under the English rules of 1883.

Procedural Legislation and Rules of Court

The Ontario judicature acts lay down broad principles, leaving methods of procedure to the courts. This is a principle of differentiation of function between legislature and courts for which many of

the best men at the American bar have pleaded for many years and which has often found expression in the reports and debates of the bar associations. The prescription of rules of court in acts of legislature hampers rather than promotes the efficiency of procedure. A court which makes its rules may modify them, so that through their too strict interpretation they may not lead to injustice. Where the rule is laid down by the legislature, the sound discretion of the courts cannot be exercised at all, and the rule of procedure attains the same dignity and inviolability as a rule of substantive law. The Ontario court finds itself unhampered by legislative interference, and is allowed free play for its wisdom to determine how the business of litigation can best be done, so that, to use the words of rule 183,

> A proceeding shall not be defeated by any formal objection, but all necessary amendments shall be made upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining of the real matter in dispute, and the giving of judgment according to the very right and justice of the case.

The powers of American courts should be further enlarged by the abolition of all legislative rules, so that procedure may be regulated entirely by the tribunals before which the causes are litigated. The danger that once existed at common law whereby rules of practice through long use became inflexible, need not be feared, for the ultimate power to correct an abuse would always remain in the legislature and could, in an extreme case of judicial obstinacy, be invoked.

The American people have learned to place their trust in legislatures, whether for better or worse I shall not say, and they have become correspondingly jealous of the normal powers and authority of their courts. The legislatures have in response to this feeling kept an eye on the courts and asserted a regulative supervision over them, sometimes in apparent trespass of the constitutional border lines that divide the legislative and judicial fields.

The interference of legislatures with the normal development of common law and procedure has served its purpose and has fully impressed its lesson upon the mind of all the ministers of justice on the bench and at the bar, and it may now be retired in favor of the older method of allowing the law, at least so far as practice and procedure are concerned, to be developed solely through the instrumen-

tality of its experts. No theory is more crude than that which maintains that our legislatures are more expressive of the public will and more responsive to public ideas of right than our courts. The courts are composed of judges and attorneys-at-law, who like all other men are impressed by the influence of the spirit of the times. Notwithstanding an occasional illustration of judicial insensibility to contemporary needs or tendencies, it remains true that judges express the ideas of right and expediency dominant in their day, modified however by the whole body of law and practice that has been handed down by tradition. For the individual in the pursuit of his own affairs, radicalism, modernity and self-expression may be permitted almost indefinitely; for a community of millions of people, social life must perforce be regulated largely by the rules made by the dead and not by the living.

The Single Court and Uniform Rules

The fundamental characteristic in the organization of the courts of Ontario is the single court, a supreme court consisting of two divisions, the appellate division and the high court division. The latter is the trial court for all causes. Every judge in either division is a member of the other,[1] and when necessary may sit and act as a judge of either of the divisions of the supreme court or for any judge who is absent or whose office has become vacant.[2]

In addition to the judges who sit continuously in the appellate division, five judges of the high court division are annually selected to sit as appeal judges for one year, so that there are at all times at least two appellate courts in session, and if necessary an additional temporary appellate court may be organized by the judges for the purpose of preventing the accumulation of cases not heard and the corresponding delay in final decisions.[3] The constitutionality of acts of Parliament or of the provincial legislature cannot be impugned until after notice has been given to the attorney-general for Canada and the attorney-general of Ontario, who "shall be entitled, as of right, to be heard either in person or by counsel, notwithstanding that the Crown is not a party to the action or proceeding."[4]

[1] **Judicature act**, sec. 8.
[2] *Ibid.*, sec. 14.
[3] *Ibid.*, secs. 38, 39.
[4] *Ibid.*, sec. 33.

The lieutenant-governor in council annually convenes the judges for the purpose of considering the operation of the judicature act and of the rules of court and of enquiring into any defects which may appear to exist in the system of procedure or the administration of justice, and making the necessary changes in its rules or recommending amendments that cannot be carried into effect without legislative authority.[5]

The American system (barring some slight modifications here and there) is still a system in which multiplicity of courts with exclusive jurisdiction makes possible the all-too frequent miscarriages of justice on account of successful pleas to the jurisdiction, nor have we anything equal to the rule requiring the judges to meet annually to study their rules and their effect on litigation and the promotion of justice. The provision which makes the chief law officer of the state a party in interest in every case in which the constitutionality of legislation is attacked is one that will recommend itself by its essential reasonableness.

There being but one court for Ontario it naturally follows that there is but one set of rules of court. Uniformity in rules of court in the United States has been discussed by a number of bar associations. It seems to me that it would be possible and practicable for the supreme court justices in each of our states to promulgate rules for the courts of the state, precisely as it is possible for the supreme court of the United States to promulgate rules for all of the federal courts. Proper provision could be made for the special needs of different localities, due to difference in density of population, in distances from the county seat, in convenience of transportation, etc.

Appointment of Judges

The spectacle furnished by the United States in which the courts of justice are daily held up to criticism, ridicule, contempt and even vituperation excites unbounded surprise across our northern border. The people of Canada are satisfied with their judges and their administration of the law, and yet they have absolutely nothing to do with their selection or appointment.

The minister of justice, after consultation privately with such of the bar as he sees fit, recommends an appointee to the cabinet.

[5] *Ibid.*, sec. 113.

The bar in its collective capacity does not express any opinion; the legislature has nothing to do with the selection; the judges would not think of interfering with the choice or advising as to it. The choice of the man is made by the minister of justice and submitted by him to the cabinet. If the cabinet approves, an order in council is passed; if the cabinet disapproves, a further recommendation is made by the minister of justice until the cabinet is satisfied. The recommendation of the cabinet is made to the Crown and the appointment is thereupon made.

Barring an occasional protest in favor of more active participation by the bar in the choice of the judges, this system meets with approval. No litigant who wants his case decided simply on its merits, cares anything about the residence, race, religion or politics of the upright and able judge. Considering the excellent results achieved by judges elevated to the bench otherwise than by popular election, the American people may well study their local state systems without prejudice and under the conviction that other systems may be just as good.

Details of Procedure

In Ontario actions at law or in equity are commenced by a writ of summons, are pleaded to issue by a statement of claim, statement of defense, and, if necessary, plaintiff's reply, with full power in the court to allow any and all amendments that may be deemed necessary, and to bring in by third-party procedure any person or persons who may have any interest in the controversy. All persons whether interested jointly, severally or in the alternative may be joined as plaintiffs or defendants, and judgment may be given against one or more of the defendants, for one or more of the plaintiffs.[6] Several causes of action may be included in the same proceeding,[7] and if there are many persons having the same interest, "one or more may sue or be sued, or may be authorized by the court to defend, on behalf of, or for the benefit of all."[8]

It becomes possible under the Ontario system to dispose of the interest of all parties to a controversy in one action, and all differences between law and equity, contract and tort, right to property

[6] Rules 66 and 67.
[7] Rule 69.
[8] Rule 75.

or right to damages are merged in the fact that the controversy arises out of the same transaction and that all of the parties have an interest in the whole or some part of it. The effect of this rule is to prevent multiplicity of actions and reduce the amount of litigation arising out of a single transaction.

It was feared at one time by the bar of Ontario that this and other rules making for simplicity and speed would reduce the business of the bar, but the result has proved quite the contrary. The knowledge that all controversies arising out of a single transaction may be disposed of at one trial swiftly, justly and certainly has encouraged litigation. I have before me the calendar of the supreme court of Ontario, appellate division, for appeals entered for the month's session, commencing April 7, 1913. There are sixty-nine cases on the list, fifty-one of which are from judgments entered during 1913, that is to say, within three months of the date of the argument on appeal; thirteen within six months and five older cases antedating this period. Of the cases in 1913, five are less than a month old since judgment, thirty-one are less than two months old. The appellate divisions of Ontario hear and dispose of about 800 cases per annum whereas the average record of the supreme and superior courts of Pennsylvania is about 1,200 cases per annum. It will be seen therefore that in Ontario, with a population of about 3,000,000 as against a population of 8,000,000 in Pennsylvania, the appellate courts dispose of almost twice as many cases in proportion to population as the appellate courts of Pennsylvania. This should allay the fears of members of the bar that simplicity and speed would reduce the emoluments of the profession. The simpler the procedure and the more expeditious the trial the greater will be the interest of the public in this method of adjusting its difficulties and the greater the amount of business that the bar will be called upon to administer.

One of the startling methods for saving time is that laid down in Ontario rule 232:

> On all appeals or hearings in the nature of appeals, and on all motions for a new trial, the court or judge appealed to shall have all the power as to amendment and otherwise of the court, judge or officer appealed from, and full discretionary power to receive further evidence, either by affidavit, oral examination before the court, or judge appealed to or as may be directed.

Under this rule, the court on appeal will hear testimony if necessary to supplement the record from the trial court instead of send-

ing the case back for retrial with all the attendant delay, cost and disappointment.

After pleadings are filed either party may be cross-examined by the other prior to trial upon the allegations therein.[9] This examination for discovery is necessary in three-fourths of all cases. By compelling disclosure of the real merits and defects of the case of both sides it promotes settlement out of court and saves the time and cost of trial; it also enables better preparation to be made and curtails the length of the trial.[10]

A series of similar rules[11] are those relating to the production of documents before trial whereby not only parties but also third persons may be compelled to exhibit for inspection papers alleged to relate to any matter in controversy. The theory underlying these rules is that no man shall be permitted to conceal any fact necessary to bring into light the real merits of the controversy, and the element of chance, which makes litigation so fascinating a game to the bar and so distressing to the litigants in many of the United States, is reduced to a minimum.

The Jury

Under the Ontario system[12] the right to trial by jury in civil cases exists only in certain cases in tort, and practically all other issues of fact are tried and all damages assessed by a judge without a jury.[13] If a party desires a jury trial notice must be given, but notwithstanding such notice the presiding judge may dispense with the jury.[14] The court may direct the jury to give a special instead of a general verdict,[15] and in all actions whatsoever, except in an action for libel, the judge may direct the jury merely to answer questions of fact put to them by him and not to give any verdict at

[9] Rule 327, etc.

[10] Paper of J. H. Spencer read at meeting of Ontario Bar Association in 1908, and Report of the Committee on Law Reform at same meeting. 45 *Can. L. J.*, 19, 23.

[11] Rules 348–352.

[12] Judicature act, sec. 53.

[13] *Ibid*, sec. 55.

[14] *Ibid.*, sec. 56.

[15] *Ibid.*, sec. 60.

all.[16] This method of substituting answers to specific questions for a verdict is used in nearly all cases. "The court may obtain the assistance of merchants, engineers, accountants, actuaries or scientific persons in such way as it thinks fit to enable it to determine any matter of fact in question in any cause or proceeding and may act on the certificate of such persons."[17]

It will be seen from these provisions that a profound change has taken place in Ontario in trial by jury. This ancient system which contributed so much to the development of the English constitution and to the maintenance of the liberties of the people no longer satisfies the demands of justice. Blackstone foresaw this,[18] and the French Canadians at the time of the introduction of English law could not understand how Englishmen would sooner have their property rights determined by the jury of tailors and shoemakers than by judges.[19] The American states are hampered in the establishment of jury reform by the provisions of the seventh amendment to the federal constitution.

Judicial Opinion in Legislative Matters

Although strictly speaking this subject is not relevant under the general caption of this article, I cannot refrain from making mention of a method in vogue in Ontario whereby much bad legislation is nipped in the bud. The practice is to refer all private acts to two judges for an opinion upon their justice and expediency,[20] and furthermore[21] the lieutenant-governor in council, i.e., the government, may refer to the court for hearing or consideration any matter which he thinks proper to refer for an opinion as in an ordinary action. If the constitutional validity of an act of the legislature is involved the attorney-general must have notice and the court may direct any party in interest to be notified of the hearing or may request some counsel to represent such interest. After hearing the

[16] *Ibid.*, sec. 61.

[17] Rule 268.

[18] 3 *Black. Com.*, 381.

[19] *Practice, Civil and Criminal in Ontario*, by the Hon. William Renwick Riddell, an address delivered before the annual meeting of the New York State Bar Association, January 20, 1912, p. 10.

[20] R. S. O. 1897, cap. 52.

[21] *Ibid.*, cap. 84.

court files an opinion which becomes a judgment subject to an appeal as in an ordinary action. This system has not yet been expanded to its full possibilities in Ontario, and is, I believe, practically unknown in the United States. As a method for eliminating much improper legislation it deserves most serious consideration. Such a method would impose additional duties on the judges, but granting the desirability of having a judicial opinion upon legislation either prior to its enactment or before any actual case arises under it, it might be advantageously adopted and expanded. It is in line with the general modern tendency to rely in technical matters on the opinion of experts, and there is much to be said in favor of introducing the expert into the field of law-making instead of limiting his function to the field of interpretation only after an actual controversy has arisen, in which the legislative act in question is invoked and must be applied.

The comparison between the Ontario and American practice, briefly and superficially herein presented, points out several lines of rational reform which it would be well for our statesmen and legislators to consider in their attempts to bring judicial procedure into alinement with modern needs and tendencies.